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83-385

No. 83-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

MARLENE GRATCHNER CLARK,

*Petitioner,*

v.

ELIZABETH HANSFORD DOLE, Secretary,
United States Department of Transportation.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTIONS PRESENTED

On April 14, 1978, the United States Department of Justice issued a directive that the United States would not seek costs when it was the prevailing defendant in a Title VII action unless the action was brought in bad faith, the action was pursued in a harassing or vexatious manner, or the claim was patently frivolous. The directive as not formally rescinded until April 1, 1983. Nevertheless, petitioner was assessed costs incurred between 1978 and 1983 even though the above standards were not met.

1. Was the government estopped from seeking costs in view of its publicly announced policy against seeking such costs unless the standards for awarding attorneys' fees set out by this court in Chris-

tiansburg Garment Company v. EEOC were met?

2. Whether the courts below applied the proper standards in assessing costs against a losing plaintiff in a Title VII case against an agency of the United States government?

## PARTIES

Marlene Gratchner Clark,

Petitioner, Plaintiff below.

Elizabeth Hansford Dole,
in her official capacity as
Secretary, United States
Department of Transportation,

Respondent, Defendant below.

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No. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

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MARLENE GRATCHNER CLARK,

Petitioner,

v.

ELIZABETH HANSFORD DOLE,
Secretary, United States
Department of Transportation

==========

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, by her undersigned counsel, prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit entered on June 7, 1983, affirming the order of the district court awarding costs against plaintiff.

## OPINIONS BELOW

The decision of the court of appeals is unreported and is set out at pages 1a-2a of the Appendix. The district court's memorandum decision of August 18, 1982 is also not reported and is set out at pages 3a-6a of the Appendix. The district cour't order denying petitioner's Motion to Alter and Amend its order assessing costs is not reported and is set out at pages 7a-9a of the Appendix. The district courts Memorandum Opinion and Order relating to the merits of the Title VII claim in this case are not reported and are set out at pages 10a-49a.

## JURISDICTION

The judgment of the court of appeals was entered on June 7, 1983. Jurisdiction of this court is invoked under 28 U.S.C. §1254 (1).

## STATUTES, RULES and DIRECTIVES INVOLVED

28 U.S.C. 1920 provides:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree. (As amended Oct. 28, 1978, Pub.L. 95-539, §7, 92 Stat. 2044.)

Rule 54(d), Fed.R.Civ. Proc., provides:

> Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion serviced within 5 days thereafter, the action of the clerk may be reviewed by the court. (As amended Dec. 27, 1946, eff. Mar. 19, 1948; Apr. 17, 1961, eff. July 19, 1961).

This case also involves the April 14, 1978 and April 1, 1983 directives of the Department of Justice setting guides for seeking costs in federal employee suits. Because of their length they are reproduced in Appendix II hereto, at pp. 57a-58a and 63a respectively.

## STATEMENT OF THE CASE

### 1. The Proceedings Below

This petition raises the question of whether the courts below were correct in awarding costs against the petitioner, the plaintiff in a Title VII case against an agency of the federal government. This proceeding was begun in 1979 through the filing of administrative complaints charging discrimination based on sex in violation of Section 717 of the Equal Employment Opportunity Act of 1972 (42 U.S.C. §2000e-16).

Petitioner is a GS-12 civilian employee of the Federal Aviation Authority, a sub-agency of the Department of Transportation. Defendant is the Secretary of Transportation. The gravaman of the discrimination complaints related to a failure to promote plaintiff as well as attempts to take disciplinary actions

against her.[1/]

During the administrative processing of the complaint, a complaints examiner from the Equal Employment Opportunity Commission recommended that it be found that plaintiff had been discriminated against; however, the agency declined to follow the recommended decision and issued a decision rejecting her claim.[2/] A timely complaint was filed in United States District Court for the District of Columbia and, following discovery, the case was tried in January, 1982.

The district court issued a memorandum opinion rejecting plaintiff's claims on the

---

1/ Petitioner also claimed a violation of the Equal Pay Act related to the failure to promote her.

2/ Two agency investigators also had recommended a finding of discrimination. Further, the disciplinary action taken against petitioner had been overturned as a result of an arbitration proceeding.

merits and holding that she had not been discriminated against. (App. 10a-49a.) No appeal was taken from the decision on the merits, and except to the extent discussed below relating to the standard for assessing costs, that decision is not at issue in this appeal.

Following the decision in its favor the United States, acting through the United States Attorney's Office, filed a bill of costs in the amount of $5,462.24, which included $2,259 for daily transcripts that had been ordered by the government. At no time did the government seek costs on the ground that the action was frivolous, brought in bad faith, or for the purpose of harassment. Plaintiff's trial counsel filed a motion in opposition to the bill of costs.

In addition to objecting to certain portions of the costs, particularly the

cost of the daily transcript, the motion brought to the district court's attention the fact that in April, 1978, the United States Department of Justice had issued a directive to all United States attorneys instructing them that in Title VII cases costs would not be sought when the government prevailed unless the standards for awarding attorneys' fees established by this court in Christiansburg Garment Company v. EEOC, 434 U.S. 412 (1978) were met. (App. 58a-59a). Nevertheless, the district court awarded costs in the amount of $3,969.25 without discussing the effect of the Department of Justice directive. In its decision the district court stated that:

> While the plaintiff's claims in this proceeding were certainly not well supported, they were not completely frivolous. The Court will credit the plaintiff with the assumption that she pursued the litigation in good faith.

(App. 4a). An appeal was taken from the award of costs, and the United States Court of Appeals for the District of Columbia Circuit affirmed the decision of the court below per curiam without a written opinion on June 7, 1983. (App. 1a-2a).

2. The History of the Department of Justice Policy on Costs in Title VII cases.

In 1977, different judges in the District of Columbia issued decisions relating to the question of assessment of costs against plaintiffs in Title VII in which the United States government had prevailed. In Jaspers v. Alexander, 15 FEP Cases 1234, 1238 (D.D.C. 1977) Judge Flannery held that, because of the imbalance of resources between an individual Title VII plaintiff and the federal government, it would be destructive of the goal of encouraging the bringing of Title VII litigation routinely to assess costs against

plaintiffs who have lost such cases. Rather, costs would only be assessed if a determination were made that the action was brought frivolously and not in good faith. (Id. at 1240). In Thomas v. Secretary of the Navy, 15 FEP Cases 572 (D.D.C. 1977), on the other hand, Judge Richey assessed partial costs against a plaintiff even though the action had not been brought frivolously or in bad faith.

An appeal was taken in Thomas under the sponsorship of the Washington Lawyers Committee for Equal Rights Under Law, a civil rights organization. As a result of negotiations with the Civil Division of the United States Department of Justice, the appeal in Thomas was eventually dismissed as moot by a joint motion by the parties based on the issuance by the Civil Division of a directive to all United States attorneys and agency counsel. (App. pp. 50a-

58a). This directive, which was published and made public knowledge through its appearance at CCH Fair Employment Practices ¶5083 (1978) (App. pp. 57a-58a), provided that it was the policy of the United States not to seek costs against plaintiffs in individual Title VII cases unless the Christiansburg standards were met. In discussing the reasons for the policy the following principles were set forth.

> In Christiansburg Garment Co. v. Equal Employment Opportunity Commissin, 46 U.S.L.W. 4105, 4107 (U.S. Jan. 23, 1978), the United States Supreme Court, in declining to allow attorneys' fees to be rountinely awarded to prevailing defendants in Title VII actions, characterized the Title VII plaintiff-employee as "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority'" (quoting Newman v. Piggie Park Enterprises, 390 u.S. 400, 402 (1968)). Because the Title VII plaintiff-employee appears before the court "cloaked in a mantle of public interest," United States Steel Corp. v.

United States, 519 F.2d 359, 364 (3d Cir. 1975), the rule that prevailing parties generally are entitled to the costs of the lawsuit should not apply automatically to actions in which the Federal Government defeats an employee's Title VII charge of discrimination. As one court has stated: "The awarding of costs to the Government when it successfully defends itself against a Title VII claim should not become a mechanical process that will discourage potential plaintiffs from pursuing debatable claims." [Citing Jaspers v. Alexander, supra.]

* * *

Accordingly, the Government should not move for costs as a prevailing defendant in a discrimination suit brought by a federal employee under Title VII unless any one of the following three cicumstances is found to exist:

(1) the plaintiff brought the action in bad faith;

(2) the plaintiff pursued the claim in a harassing or vexatious manner;

(3) the plaintiff litigated a claim that was patently groundless or frivolous.

* * *

In applying the third factor (baselessnes of the claim), the Government should heed the Supreme Court's cautionary language in Christiansburg, 46 U.S.L.W. at 4107-08:

> [I]t is important that a district court resist the understandable temptation to engage in post-hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief tht he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in

> the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

(App. 57a-58a.)

As noted above plaintiff's counsel in this case were aware of this policy and brought it to the attention of the district court. In its response to the Motion in Opposition to Costs the United States attorney made the assertion that the policy had been rescinded but provided no documentation for this statement. In fact, the policy was not formally rescinded by the Department of Justice until April 1, 1983, after the costs in the present action had been incurred.

The rescission was taken as a result of the question of costs beng raised in another action (in which the undersigned counsel for petitioner are involved), Lewis v. National Labor Relations Board,

(S.D. Tex. C.A. No. 76-H-780). In Lewis the government sought costs of over $13,000 after a decision in its favor on the merits of a Title VII class action. Costs were objected to on the basis of the April, 1978 directive. Thereafter, on April 1, 1983, a new memorandum was issued by the Civil Division stating:

> As you are aware, the United States, like any other litigant, is entitled to recover the costs of litigation under Rule 54(d), Federal Rules of Civil Procedure. I would like to remind you that when the government is considering moving for costs as the prevailing defendant in litigation, discretion should be exercised in determining whether a request for the assessment of costs or a reduction in the amount of costs is appropriate. Although it is difficult to establish any set rules for determining under what circumstances costs should not be sought, there may be cases, for example, when the plaintiff's finanacial situation at the time the ltigation was initiated or as a result of the litigation,

> warrants a request for a reduction in costs or a waiver or costs.
>
> * * *
>
> This memorandum supersedes the memorandum of the Assistant Attorney General, Civil Division, dated April 14, 1978.

(App. p. 64a).

In an affidavit filed in Lewis the current head of the Civil Division indicated that as late as February, 1983, he had not even been aware of the April 14, 1978 memorandum. (App. pp. 60a-61a).

Thus, it is clear that at the time the costs were incurred in the present action the 1978 directive was still in force. Petitioner's counsel, as well as other members of the bar, were aware of the policy[3/] and were conducting litigation in light of it.

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3/ See Schlei and Grossman, Employment Discrimination Law, (Second Edition) p. 1215, n.186 (1983).

## REASONS FOR GRANTING THE WRIT

### This Case Raises Important Issues Concerning the Standards By Which Costs Should Be Assessed In Favor of the United States In Title VII Cases

1. The Importance of the Issue.

The question of the standards governing the award of costs to a prevailing defendant in actions brought under Title VII of the Civil Rights Act of 1964, and other civil rights statutes, has yet to be decided by this Court. In Christiansburg Gament Co. v. EEOC, 434 U.S. 412 (1978), the Court held defendants should be awarded attorneys' fees as part of the costs only if the action was frivolous, patently groundless, or brought vexatiously or for harassment. A dual standard for awarding fees was established in light of the overriding purpose of the civil rights acts

of encouraging the bringing of private litigation to enforce the rights they established.[4/]

With regard to costs generally, this Court has held that their granting is to be governed by a court's equitable discretion. See, e.g., Delta Air Lines v. August, 450 U.S. 346 (1981); Farmer v. Arabian American Oil Co., 379 U.S. 227 (1964). Nevertheless, in a series of recent decisions the lower courts have held that costs should be awarded to prevailing Title VII defendants as a matter of course.[5/] In a number of

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4/ Compare, Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968).

5/ Croker v. Boeing Co., 662 F.2d 975 (3rd Cir. 1981); Allen v. U.S. Steel Corp., 665 F.2d 689 (5th Cir. 1982); Danner v. U.S.C.S.C., 635 F.2d 427 (5th Cir. 1981); Poe v. John Deere Co., 695 F.2d 1103 (8th Cir. 1983); NOW v. Bank of California, 680 F.2d 1291 (9th Cir. 1982); Montgomery v. Yellow Freight System, 671 F.2d 412 (10th Cir. 1982).

these decisions the courts have distinguished Christiansburg as dealing with fees, without discussing how the underlying purpose of the Act that resulted in the Christiansburg rule might also apply to awards of costs.[6/] In others costs are simply assessed without discussion.[7/]

The question of the equitable factors that should be considered in awarding costs is of particular importance in cases involving the federal government. Thus, the problem of discouraging private plaintiffs from pursuing possibly meritorious claims[8/] is exacerbated because there is no public attorney-general to bring Title

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6/ See, e.g., Poe v. John Deere Co, supra; NOW v. Bank of California, supra.

7/ E.g., Danner v. U.S.C.S.C., supra.

8/ See Jaspers v. Alexander, 15 FEP Cases 1234, 1238-39 (D.D.C. 1977).

VII and other civil rights actions against federal agencies. Therefore, enforcement depends entirely on the willingness of private parties to pursue their claims. See Parker v. Califano, 561 F.2d 320, 331 (D.C. Cir. 1977). Another equitable consideration -- the relative resources of the parties -- also clearly militates against routinely assessing costs in favor of the government where the plaintiff is one of its own employees of modest means.[9/]

In addition to these considerations, here, there is present the Department of Justice's announced policy of not seeking costs unless the Christiansburg standards

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9/ See Boas Box Co. v. Proper Folding Box Corp., 55 F.R.D. 79, 81 (E.D.N.Y. 1971); Jaspers v. Alexander, supra at 1240; cf. United States Steel Corp. v. United States, 519 F.2d 359, 363 (3rd Cir. 1975). But see, Baez v. U.S. Dept. of Justice, 684 F.2d 999, 1005-06 (D.C. Cir. 1982)(en banc).

are met.[10/] As described in the Statement of the Case, supra, in 1978, in settlement of the costs issue in another case, the Department of Justice issued a directive setting out that policy. It is not open to question that plaintiff's attorneys knew about the policy and, indeed, they brought it to the attention of the district court. Therefore, the litigation decisions made by those attorneys, as well as those of other attorneys involved in Title VII actions against the federal government were necessarily made in light of the announced policy of the government. For example, a decision to conduct certain discovery or to even proceed with an action might be substan-

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10/ As also noted above, the government did not argue that these standards were met in this case and the courts below did not so find.

tially different if counsel knew that a plaintiff, particularly a mid or low-level GS employee such as petitioner here, might have to bear significant costs as a penalty for having pursued her rights under Title VII.

During the five years between April 1978 when the policy was announced, and April 1983, when the policy was officially and publicly rescinded, there have been a substantial number of Title VII actions, both individual and class, against federal agencies. Therefore, the question of whether or not the 1978 directive acts to estop the government from seeking awards of costs is likely to be a recurring one. Indeed, it has already arisen in two other cases that counsel is familiar with and, given the government's present policy of seeking such costs will certainly emerge in

a large number of other cases which have been proceeding to trial or are waiting decision.

Thus, counsel, who are associated with one of the major civil rights litigating organizations, have in the past two years tried eight cases against federal government agencies. Of the four that have been decided, two were lost at the trial court level and in both instances the government sought costs. In one, costs were awarded and the issue is before the Fifth Circuit;[11/] in the other, a ruling in favor of the government on another issue was reversed on appeal and, therefore, the issue of costs did not have to be reached.[12/]

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11/ Lewis v. N.L.R.B., S.D. Tex. C.A. No. 76-H-780; 5th Cir. No. 83-____.

12/ Lawler v. Alexander, 698 F.2d 439 (11th Cir. 1983).

Thus, the issue of the proper standards for awarding costs in a federal government title VII case is an important one that should be resolved by this Court. As will now be shown, the failure of the courts below to give effect to the 1978 directive also conflicts with decisions of this Court.

2. The Decision Below Is In Conflict With Decisions of This Court Relating to the Retroactive Application of Changes In the Law

In a number of cases this Court has held that the general rule in the federal courts is that changes in the law, whether by statute, regulation, or administrative directive, will apply to all cases pending on the effective date of the change. Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969); Bradley v. Richmond School Board, 416 U.S. 696 (1974); Hutto v.Finney,

437 U.S. 678 (1978). However, those cases have also held that there is an exception to this general rule; that is, such changes will not be applied where manifest injustice will result. Thorpe, supra. Green v. United States, 376 U.S. 149 (1964).

Petitioner urges that this is a classic case in which such a "manifest injustice" would result because of the reliance of attorneys and their clients on the publicly announced policy of the government not to seek such costs except under limited circumstances. In Bradley, supra, this Court identified three factors to be examined in determining whether the exceptional should apply "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon these rights." 416 U.S. at 717.

Plaintiffs' trial attorneys, who are experienced civil rights litigators (see Parker v. Lewis, 670 F.2d 249, 250 (D.C. Cir. 1982)), were fully aware of the Department of Justice policy against assessing costs against plaintiffs unless a case was frivolous. Plaintiff, who is a GS-12 employee of the government, in pursuing her action based on the advice of counsel therefore had no contemplation that if she lost on the merits she would be faced with the assessment of costs. Indeed, quite to the contrary, she had every reason and right to expect she would not in light of the April 14, 1978 directive, which was not rescinded until long after the government's costs were incurred.

Thus, if costs are now assessed against her she wil be liable because "of standards which [she] properly believed were not applicable to [her] at the time of

her acts." Hughes v. Heylt & Patterson, Inc., 647 F.2d 452, 454 (4th Cir. 1981).[13/]

Having relied on the existence of the policy and having litigated her case in good faith it would be clearly unjust to impose on the plaintiff, or indeed on any other Title VII plaintiffs, costs for litigation activities conducted prior to April 1, 1983, because of the unannounced unilateral action of the government. This type of "sandbagging" would be both unjust and inequitable and provides precisely the type of exception to the general rule regarding the assessment of costs which requires the reveral of the decision of the courts below.

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13/ See also Iowa Public Service Co. v. I.C.C., 643 F.2d 542 (8th Cir. 1981); Smart v. Porter Paint Co., 630 F.2d 490, 497 (7th Cir. 1980); Ia Power & Light Co. v. Burlington Northern, Inc., 647 F.2d 796, 806 (8th Cir. 1981).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the court below should be reversed.

Respectfully submitted,

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# APPENDIX I

## Decisions of the Courts Below

JUDGMENT OF THE COURT OF APPEALS,
June 7, 1983

IN THE UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 82-2249

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MARLENE GRATCHNER CLARK,

Appellant,

v.

ELIZABETH HANSFORD Dole,
Secretary of Transportation

Appeal from the United States District Court
for the District of Columbia

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Filed June 7, 1983

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Before: Wilkey and Mikva, Circuit Judges, and McNichols,* Senior District Judge, United States District Court for the District of Idaho

*/ Sitting by designation pursuant to 28 U.S.C. § 294(d).

JUDGMENT

ORDERED and ADJUGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby affirmed. It is

FURTHER ORDERED, by this Court, sua sponte, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981, and June 15, 1982.

Per Curiam

/s/
George A. Fisher
Clerk

ORDER OF THE DISTRICT COURT,
Aug. 18, 1982.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 80-1636

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MARLENE G. CLARK,

Plaintiff,

v.

ANDREW L. LEWIS, JR.,
Secretary, Department of
Transportation

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Filed, Aug. 18, 1982

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ORDER AND JUDGMENT FOR COSTS

The Court dismissed this action with prejudice by a Memorandum Opinion entered March 1, 1982, finding that plaintiff, Marlene Clark, had failed to prove her claim of discrimination under Title VII of the Civil Rights Act of 1964, and the Equal Pay Act of 1963. Plaintiff now opposes a

bill of costs submitted by the defendant in the total amount of $5,462.24. The bill of costs includes court reporter charges for portions of transcripts necessarily obtained and used by the defendant during the trial, fees for witnesses, and deposition costs.

Fed. R. Civ. P. 54(d) gives the Court discretion in allowing costs to the prevailing party. In exercising such discretion, the Court notes that Congress intended Title VII proceedings to act as a vehicle in eliminating discrimination in employment and that charging litigation costs may discourage litigants from bringing meritorious claims. While the plaintiff's claims in this proceeding were certainly not well supported, they were not completely frivolous. The Court will credit the plaintiff with the assumption that she pursued the litigation in good

faith.

After carefully reviewing the bill of costs, the Court concludes that transcript costs were reasonable since the record shows that they were used by counsel in their final arguments. Similarly, the costs incident to the taking of depositions were necessary to the defense of this litigation. However, the Court finds the itemized fees for the two government witnesses excessive. Theodore Robinson, a government employee from New York who sat with defense counsel throughout the 11 day trial, listed expenses for 16 days. Brian Vincent, a government witness also from New York, listed expenses for six days. These expenses are excessive and they should be disallowed. All other costs are fair and reasonable.

Accordingly, it is this 18th day of August, 1982,

ORDERED that the Clerk of the Court shall tax costs against the plaintiff, Marlene Clark, in the full sum of $3,969.25 covering the court reporter charges and costs incident to the taking of depositions. All other costs requested by the defendant are denied. The judgment for costs in the amount of $3,969.25 is entered against the plaintiff Marlene Clark.

/s/ Barrington D. Parker
Barrington D. Parker
United States District Judge

ORDER OF DISTRICT COURT, Sept. 9, 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 80-1636

==========

MARLENE G. CLARK,

Plaintiff,

v.

DREW LEWIS,
Secretary, Department of
Transportation

==========

Filed Sept. 9, 1982

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O R D E R

The Court has considered plaintiff's Motion to Alter or Amend, the Memorandum of Points and Authorities in Support thereof, the Opposition of the Government, the Court's Memorandum Opinion and Order of March 1, 1982, and the entire record herein, and determines that the plaintiff's

motion is without merit and should be denied.

In awarding costs under Rule 54(d) of the Federal Rules of Civil Procedure, the controlling factor is whether the transcripts of deposition and trial testimony were used by the prevailing party in the particular case. Here, the Government prevailed on the merits, and, as the record shows, used the transcripts in the preparation and presentation of its case. The fact that the plaintiff never utilized the transcripts has no effect on the taxing of costs against the plaintiff. See Sun Ship, Inc. v. Lehman, 655 F.2d 1311 (D.C. Cir. 1981); Marcoin, Inc. v. Edwin K. Williams and Company, Inc., 88 F.R.D.. 588 (E.D. Va. 1980).

Based on the foregoing it is, this 9th day of September, 1982,

ORDERED that plaintiff's Motion to Alter or Amend be, and the same hereby is, denied.

/s/ Barrington D. Parker
Barrington D. Parker
United States District Judge

OPINION OF DISTRICT COURT ON THE MERITS
Mar. 1, 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1636

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MARLENE CLARK,

Plaintiff,

v.

DREW LEWIS,

Defendant.

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Filed March 1, 1982

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MEMORANDUM OPINION

INTRODUCTION

In this proceeding Ms. Marlene Clark charges the Department of Transportation and its agents with sex discrimination and acts of harassment and reprisal exercised against her as well as failing to pay her

equal compensation during her employment at the Federal Aviation Administration (FAA), a component of the Department. She claims that her rights as a federal employee were violated under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-16 et seq. and the Equal Pay Act, 29 U.S.C.; § 216(d).

On September 5, 1976, plaintiff commenced employment with the FAA as a GS-7 trainee aviation safety inspector in the General Aviation District Office, Flight Standards Division Baltimore, Maryland. On April 24, 1977, she was transferred to th Flight Standards District Office at Washington National Airport. The functions of that office were later transferred to Dulles International Airport. On September 11, 1977, she was promoted to the GS-9 level. On September 10, 1978, she was promoted to the GS-11

level. She received a promotion to a GS-12 position in early 1981.

The plaintiff's sex discrimination and Equal Pay Act claims arose after her transfer from the Baltimore to the Washington District Office. She points to a one-day suspension, her failure to receive a GS-12 promotion before March, 1981, and other acts of her supervisors as evidence of sex discrimination. She claims that she performed work at a GS-12 level for several years but was only paid at a GS-11 level, all in violation of the Equal Pay Act.

The proceedings were heard without a jury over a period of 11 days. The Court has considered the oral testimony and documentary evidence presented by the parties. There were sharp conflicts in testimony and the Court has weighed and assessed the credibility of the plaintiff, her various witnesss and the several

persons testifying for the FAA. The various memoranda of counsel and their final written submissions have also been considered.

The Court concludes that Ms. Clark has failed to sustain her burden of showing a violation of either Title VII or the Equal Pay Act. The clear preponderance of testimony demonstrates that the plaintiff was not discriminated against because of her sex and that she does not have a valid Equal Pay Act claim. Accordingly, her claims should be denied and her complaint dismissed.

In accordance with Rule 52(a), Fed. R. Civ. P., the Court enters the following findings of fact and conclusions of law.

## FINDINGS OF FACT

When the plaintiff was hired as a trainee aviation safety inspector in

September, 1976, the FAA was actively engaged in efforts to increase its minority employment of safety inspectors. New employees were generally recruited either from a civil service register of eligibles on which few, if any, women were listed, or from the ranks of government workers found to be qualified. Plaintiff's application was submitted to the FAA Eastern Regional Office by Mr. Clifford Schum, an administrative assistant to Jeff Cochran, deputy administrator of the FAA. Although Schum represented that the plaintiff did not meet all qualifications, the FAA was eager to show its good faith efforts toward minority hiring.

The Regional Office official immediately involved in her hiring was Mr. Brian Vincent, Chief of the Flight Standards Division for the Region. Vincent confirmed Schum's representations as to the plain-

tiff's limited qualifications and experience. She was not on the register and while employed in government service, she did not meet the basic qualifications of a regular safety inspector. Nor did she meet the minimum standards of flight time required by the FAA. Her experience was also limited as to the type of aircraft she had flown, restricted largely to primary-type rather than a complex-type of airplane. She was also limited in her years of experience.

Based on her credentials, Ms. Clark was appointed to a temporary one-year GS-7 training position. According to Vincent, the Eastern Region had adopted a viable affirmative action program and desired to make progress in the employment of minority and female safety inspectors. The plaintiff afforded such an opportunity.

She was first assigned to the Balti-

more District Office operating from the Baltimore-Friendship Airport. Shortly after the assignment, she expressed several areas of dissatisfaction: her non-involvement in a full range of productive and interesting activities that she felt capable of handling, lack of training opportunities, and differences with her supervisors. At the same time, plaintiff's supervisors complained generally of her attitude toward direction and guidance. Following a meeting at the Regional Office in New York, and in an effort to resolve the problems of her employment in the Baltimore Office, Ms. Clark was transferred in April, 1977 to the Washington District Office.

Mr. Milton Gunther served as Chief of the Washington District Office from 1972 to July, 1979. When plaintiff was transferred, Gunther was her Chief and second

line supervisor. He delegated her immediate supervision to Mr. Theodore Robinson. She worked under Robinson's supervision from April, 1977 until September, 1980, when he accepted an assignment with the FAA in the New York City area.

While Robinson was designated as plaintiff's immediate supervisor, she frequently discussed her work assignments and duties with Gunther rather than with Robinson. This was true even though Gunther clearly spelled out the chain of supervision to her on many occasions. He testified that after a while it was obvious that she avoided and resisted supervision from Robinson. Indeed, Gunther noted that there were occasions when she would not even accept his supervision but would insist upon his calling the New York Regional Office. As he put it, she wanted to hear from a higher authority and would

not accept his word. This was a frequent occurrence and it was not even unusual for her to call the Regional Office on her own.

Gunther testified to various instances of the plaintiff's disruptive behaviour which bordered on insubordination. While he was hard pressed to supply specific examples of such conduct, he had no doubt that they occurred and commented that they stood out "like a sore thumb." The Court accepts his testimony as credible. Moreover, it was corroborated by other witnesses who worked with the plaintiff.

At this time, the plaintiff held either a GS-7 or GS-9 position and Gunther, a GS-14 or GS-15. He explained the reason for allowing the plaintiff to ignore supervision and to take such latitude was the expressed desire of the Eastern Regional officials to extend all efforts to

resolve a difficult situation. This was not unreasonable since Ms. Clark was the first female inspector hired.

The Alleged Title VII Violations

Plaintiff claimed a violation of her Title VII rights based upon a one-day suspension in July, 1979, her failure to be promoted to a GS-12 journeyman level in September, 1979, and other incidents, such as her detail to Washington headquarters in June, 1980. The Court finds that the plaintiff has failed to establish sufficient support for these claims. In addition, the defendant has clearly explained the reasons for these actions, which are valid and nondiscriminatory.

The one-day suspension was based on three specifications: (1) failure to follow orders with regard to a Jack King incident;

(2) failure to follow FAA procedures and regulations in handling airmen certification files; and (3) making an unfounded public statement about a co-worker. Plaintiff's supervisor, Theodore Robinson, initiated the suspension action. The testimony showed that after counselling sessions with Ms. Clark, the action was filed because of her continual course of conduct as well as specific instances where she failed to follow instructions or accept supervision. The record reflects a pattern of such attitudes and conduct on her part.

As to the Jack King incident, plaintiff contended that she did not fail to follow instructions because none were given. Her testimony was directly contradicted by Mr. John Crouse, her present supervisor, who was acting supervisor at the time. Crouse stated that although he

was unaware of Robinson's instructions to Clark at the time he originally spoke with her, she later admitted that Robinson had given her instructions. The plaintiff could provide no plausible explanation for the discrepancy between her testimony and that of Crouse. The Court rejects her testimony in this regard.

As to the second reason underlying the suspension, Clark attempted to show that male inspectors committed similar errors without reprimand. But such an explanation misses the point and is irrelevant. The plaintiff was not suspended simply because she made one error on an airman certificate, but for a series of mistakes in handling the files and for other similar conduct. There is no evidence in the record showing that male inspectors engaged in a repeated course of conduct comparable to hers, namely, failing to follow instruc-

tions and FAA procedures and resisting supervisory guidance. In fact, the evidence is quite to the contrary.

Ms. Clark argued that the third specification was also inappropriate because the employee, Roger Boggs, had contributed to the problem at issue and because her statement about him was not without foundation. Robinson testified that he considered plaintiff's statement unfounded because Boggs had not been responsible for the matter in question. His testimony was supported by other credible evidence. He also noted that Boggs had been the frequent victim of office ridicule and that the public statement made by Ms. Clark at the time was inappropriate and unfair. The Court accepts Robinson's view of the incident.

Ms. Clark and her counsel make much of the fact that the one-day suspension

decision of the agency was subsequently overruled by an arbitration award under union grievance procedures. But her reliance upon the arbitration award is misplaced and inappropriate. The issue of sex discrimination was never present and was not argued in the arbitration proceeding. The issue there was whether the agency action conformed to the requirements of the union contract. The suspension was overturned because the specifications were found inadequate and because of the delay between the particular events and the subsequent agency action.

Mr. Vincent indicated that he consulted with the FAA Labor Relations section of the Personnel Department before he proceeded with the suspension notification. He testified that he reviewed and discussed the three suspension specifications with both the plaintiff and Robinson and con-

cluded that the action was justified. He noted that, in view of the plaintiff's continuing problems, the proposed action was an appropriate means of advising her that accepting supervision was an important part of office procedure and that supervisory instructions were necessary to achieve the objectives of day-to-day operations in an orderly and efficient manner.

The arbitration proceeding was concerned with whether there was "good cause" for disciplinary action under the collective bargaining agreement. In this Title VII proceeding, the concern is whether Ms. Clark was treated differently because of her sex. A final and important point to be noted is that the arbitration proceeding embraced only one day of testimony as compared to the more than 10 days of testimony in this proceeding where the full range of facts relating to the plaintiff

and her claimss were thoroughly explored and presented through extensive testimony.

The second prong of Clark's Title VII claim is her failure to be recommended for and to secure a promotion in September, 1979 to a GS-12 journeyman position. At the time, Robinson was still her immediate supervisor and Gunther was Chief of the Washington District Office. Gunther was replaced by Mr. George Coen, also a trial witness. Soon after Coen arrived, plaintiff confeferred with him about a promotion. Coen advised her that she could not be promoted from a GS-11 slot until the slot was upgraded which he intended to do. Contrary to the plaintiff's account, he did not tell her that she would be promoted to the position when it was finally cleared but rather that she would be promoted when and if her immediate supervisor recommended such action. The GS-12 slot was later

officially approved through regular personnel and budgetary actions. However, when Coen discussed the plaintiff's promotion with Robinson, she was not recommended. The basis reasons for Robinson's decision was the plaintiff's deportment, conduct, attitude and performance.

Mr. Robinson's evaluation of the plaintiff was not unsupported. Coen offered convincing testimony based on his personal observations, knowledge of the plaintiff's interaction with her immediate supervisor, including both Robinson and Crouse, and his own immediate contacts with the plaintiff. He testified that Clark had a poor attitude, resisted supervision, was argumentative beyond reason and otherwise caused unnecessary problems. During the course of his direct and cross examination, Coen recounted various episodes and events to support his statements.

A third incident relied upon by the plainitff to support her sex discrimination claim is her four-month temporary detail beginning in June, 1980 to the principal office of the FAA. Plaintiff contended that the detail was a retaliatory measure triggered by her discrimination charges and also served as a pretext for failing to promote her to the GS-12 level. Clark claims that she objected to the detail and that Vincent and management denied her the right to be represented by counsel at the meeting when the decision regarding the detail was made.

The Court finds that the testimony simply does not support any of these charges. There was credible evidence from Brian Vincent and George Coen as to why such a meeting was considered, namely, to alleviate a tense and worsening situation involving the plaintiff in the Washington

District Office. Vincent's testimony clearly showed that the proposal was not a disciplinary action. The reasons for the detail were fully explianed to Ms. Clark in an open meeting. She did raise questions, but her expressed concerns dealt with the opportunities it would afford and the nature of her assignments during the detail. While she did file a discrimination complaint shortly after she was on the assignment, she nonetheless acknowledged at the trial that she sought an extension of the temporary detail upon its conclusion. Beyond this, however, it is noted that FAA regulations provided for reassignment of personnel when an employee was unable to perform effectively in his immediate work situation. Clark's reassignment complied with the regulation in all respects. It did not result in a reduction in rank or compensation. Nor was it "arbitrary,

capricious, or unreasonable [but] based on sound managerial principles" (Pl. ex.198; Department of Transportation Regulations, Part 99, Employee Responsibilities and Conduct, Chap. 3, Par 64, page 19).

Theodore Robinson served as the plaintiff's immediate supervisor for a longer period than any other, from April, 1977 through the summer of 1980. Thereafter Crouse became her immediate supervisor. Robinson's testimony showed Clark unreasonably questioned and challenged his supervision and argued frequently about how assignments should be performed. She was at times insubordinate and her performance was unsteady and erratic. He related incidents to support his statements, as did other witnesses. His attempts to counsel plaintiff did not result in any changes on her part. During his testimony he referred to the above FAA regulations which also

provided that an employee should "Respond promptly to directions and instructions received from his supervisor ... [and] exercise courtesy and tact in dealing with fellow workers .... (Pl. ex. 198; Ch. 2 Rules of Conduct, Chap. 2, Par 22c, d, page 5).

Throughout his supervision, Robinson exhibited patience and forbearance, treated Clark with respect and dealt with her in the same manner as the other inspectors he supervised. He showed no type of bias or animus toward her.

The Court finds that he was justified in his decision not to recommend her for promotion and his belief that she could not undertake the responsibilities of a GS-12 journeyman.

Crouse was an inspector in the Washington District Office before he became plaintiff's supervisor. He testified that

she was at times uncooperative and unreasonable in her attitude with Robinson. She often rejected supervision and, at times, in his words went beyond "the limits of discretion." Crouse had similar experiences and related several incidents during his supervision of the plaintiff.

In seeking to discredit Brian Vincent's testimony on the effectiveness of the affimative action efforts pursued at the Eastern Region, and to show that Clark was the victim of sex discrimination at Friendship, the plaintiff called Clifford Schum as a rebuttal witness. His testimony confirmed Vincent's, namely, that plaintiff was dissatisfied at Friendship, that her employment there presented problems, and a change of employment environment should be explored. Schum also testified, as did Vincent, about a meetng at the Eastern Regional Office where plaintiff's

problems were discussed and possible solutions considered.

Aside from Schum's testimony about his participation in Ms. Clark's initial employment, which was not disputed, his testimony does not warrant serious consideration. In making this finding the Court notes that he never visited Friendship or talked to any personnel who had direct supervision over the plaintiff nor did he review any document developed by the agency relating to the plaintiff's employment at Friendship. Indeed, the sole source of Schum's information relating to plaintiff's experience at Friendship and the only source of his trial testimony were the plaintiff and her husband, Richard Clark. As to Richard Clark, there was not one shred of evidence in the record about him other than through Schum. Schum's limited facts and sources of information,

afforded no basis for the plaintiff's proffer as to his testimony.

The Court finds that the testimony offered by the agency was generally far more credible than that offered by Clark. Throughout the relevant period covering her several claims and, to come extent beyond, she exhibited a negative attitude, and an unwillingness or inaility to accept supervision. Such conduct undermines the ability of management to maintain staff efficiency and staff morale. For an individual to seek promotion to a position of responsibility, under such circumstances, asks too much. Management should not condone such conduct by advancing the employee to a higher level of responsibility and they assume a risk in doing so. As it turned out, the plaintiff was promoted to a GS-12 position but many of the same problems are still present.

No employee -- whether in the public or private sector -- is expected to be docile or maneuvered as a puppet. Initiative, intellectual curiousity and a robust interchange of ideas should be welcomed ingredients in any work situation. On direct examination the plaintiff described herself as pursuing a role of a "devil's advocate." If such was her real intent, she stretched discretion beyond limits and showed a remarkable lack of tact and restraint and sound judgment.

The testimony of Georgia Coen, who supervised the plaintiff was timely and relevant:

> "... I think it was clearly stated that my problem has always been Marlene's deportment. I have said many times everybody in the office makes mistakes. It is deportment that I have problems with Miss Clark....

* * *

> Even the union agreement talks to certain standards of conduct and deportment and Marlene was the union steward. She should be aware of them....
>
> * * *
>
> I believe that everybody -- I wouldn't want people working with me who were not willing to speak up, challenge me on occasion when I was going off wrong....
>
> * * *
>
> I don't want people who won't give opinions, who won't challenge when they think something is wrong that we are doing something wrong, but the responsible person, the one who in the final analysis goes to the next man up the line. He is responsible and once the decision is made, once it has been discussed and resolved, I think that should be the end of it and then the person should go back and do it the way the decision has been made, the way they have been instructed to do it....
>
> * * *
>
> [Ms. Clark] challenges everything. She is stil challenging everything."

(Tr. January 20, 1982, pp. 29-31).

The Alleged Equal Pay Act Violations

The plaintiff alleges that shortly

after her transfer to the Washington District Office she performed the same or greater duties than those performed by several male inspectors who were classified at higher levels. More specifically, she compared her work assignments with those of Robert Bearer, who joined the Washington Office at a GS-12 level in February, 1979. Approximately one year later he advanced to a GS-13. During this period she claims that her duties were substantially the same or greater than his.

Bearer transferred to the Washington Office with five years of experience as an air traffic controller at Miami, Florida. In transferring he suffered a loss in grade from a GS-13 to a GS-12 classification. While stationed in Miami as a traffic controller he gained experience in developing and compiling the same type of accident packages which were completed by flight

standards inspectors. He also had prior experience as a flight instructor; and had established and operated an instrument flight school in Germany for two years. Both Crouse and Vincent confirmed the importance and relevance of Bearer's air traffic experience to his expected performance as an aviation operations inspector.

Clark and several witnesses who testified in support of her claim failed to established that plaintiff's duties were the same as Bearer's or that their jobs required similar skills, efforts and responsibilties. As explained by the front-line supervisors Gunther and Coen and other witnesses, many of the office duties of inspectors were of the type that could be performed by all inspectors, whether at a GS-7, GS-9, GS-11 or GS-12 level. The important difference occurred in the complexity of the task, the amount of

supervision given, and the degree of responsibility an inspector was delegated. A comparison of the position descriptions of the GS-11 and GS-12 jobs illustrates the difference. Under the GS-11 position description, an inspector lacked the authority for action or decisions and received training in the more complex functions of the office. Although Ms. Clark made much of the fact that she was doing various flight checks and air taxi work, which Bearer did not perform, her position description indicates that such was permissible. In contract, a GS-12 inspector was delegated authority to make various decisions and commitments for the agency. Ms. Clark never had such authority.

As to Bearer not being assigned to flight checks the testimony showed that it was agency policy not to allow inspectors to perform certain flight checks until they

had taken appropriate training courses. After Bearer completed the required courses, he performed the relevant duty. He was then authorized to commit the agency as to air taxi operations, an authority wich plaintiff never possessed.

The plaintiff's equal pay claim failed to recognize the immediately relevant factors such as complexity of assignments, the degree of supervision extended and the type of responsibility delegated and assumed by an inspector. Those factors were either minimized or ignored by her. However, Ms. Clark's two front line supervisors, Gunther and Coen, as well as Robinson, offered substantial and convincing testimony on this point. Those factors, together with the fact that there was no showing that she ever committed the agency, compels a finding against her equal pay claim.

Two witnesses, John Crouse and John Sheehan, supported plaintiff's claims that she was serving at a GS-12 level. Crouse believed that she was performing at that level while she was a GS-11. He was unclear and uncertain as to the Grade 12 requirements. He testified, however, that it involved authority to commit the agency and make decisions, which, of course, was never true. It was also apparent from the testimony of Coen, Robinson and Gunther that Crouse, in many respects, had a different view of what was included in a GS-12 position description. He acknowledged that he had no direct knowledge of the level of supervision exercised over Ms. Clark or of any corrections that Robinson might have made of her work. Thus, Mr. Crouse's opinion on this point merits little weight. The same is true of Sheehan who left the Washington

Office in September, 1978, at the point in time when the plaintiff's equal pay claim began.

Other Findings

During the course of a proceeding the trial court has an opportunity to see and hear the witnesses and thereafter judge and assess their credibility. That evaluation process occurred in this proceeding and was especially warranted as to the plaintiff's testimony. There were instances when Ms. Clark's direct cross and rebuttal testimony appeared to be tangled with the truth. Several occasions were pointed out in the government's final argument with which the Court agrees.

* * *

As already noted, the trial of this proceeding extended through a full eleven days. That time was not warranted by

either the factual or the legal issues presented. While pretrial requirements were imposed, designed to facilitate a clear and efficient presentation of issues, the desired result was not obtained. In retrospect, other actions should have been pursued to facilitate a better presentation. Beyond that, however, the record and the trial transcript in this and other Title VII proceedings point to the necessity of improving the quality of trial advocacy among that bar. The trial of such proceedings should not serve as a substitute for a law school or a continuing legal education course, or a learning experience in trial practice.

CONCLUSIONS OF LAW

This Court's jurisdiction over Ms. Clark's sex discrimination claim is conferred under Title VII of the Civil Rights Act

of 1964, as amended by 24 U.S.C § 2000e-16. Jurisdiction over her equal pay claim is conferred by 29 U.S.C. § 206(c)(1).

The plaintiff has failed to establish a prima facie case of discrimination and therefore cannot prevail on her Title VII claim. McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). However, even assuming, arguendo, that she has presented a prima facie case of discrimination, she has not met her subsequent burden of demonstrating that the stated nondiscriminatory reasons for disciplinary action and nonpromotion were merely pretexts for unlawful discrimination. The ulitmate burden of proof rests with plaintiff at all times. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). She has failed to meet that burden.

The credible testimony and evidence are more than sufficient to rebut all

inferences of discrimination. There were several legitimate reasons for the disciplinary actions initiated against the plaintiff. There was abundant evidence to support and justify the decision of her supervisors. There was no showing that their actions were discriminatory and that they were initiated in a different manner against her as compared to other employees, male or otherwise. Green v. Armstrong Rubber Co., 612 F.2d 967, 968 (5th Cir. 1980); Sullivan v. Boorstin, 484 F. Supp. 836, 842 (D.D.C. 1980); see McDonald v. Sante Fe Trail Transportation Co., 427 U.S. 273, 283 (1976).

The defendant clearly showed that the reasons for Ms. Clark's one-day suspension were her resistance to supervision, refusal to follow instructions, and insubordination. These were legitimate non-discriminatory reasons for disciplinary action.

Hochstadt v. Worcester Foundation for Experimental Biology, 545 F.2d 222, 230 (1st Cir. 1976); EEOC v. Mead Foods, 466 F. Supp. 1, 4-5 (W.D. Okla. 1977); Gonzalez v. Bolger, 486 F.Supp. 595, 601-02 (D.D.C. 1980).

Likewise, for the same reasons, her supervisors wre justified and had legitimate and non-discriminatory reasons for not recommending promotion.

Section 206(d)(1) of the Equal Pay Act prohibits the federal government from paying a female employee a different rate of pay from that of a male employee "for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by

quantity or quality of production or (iv) a differential based on any other factor other than sex ...."

Plaintiff has failed to make a prima facie showing since she has not shown that the duties she performed as compared to Bearer's were the same and failed to show that the jobs entailed similar skills, efforts and responsibiliities. Taking into consideration all of the testimony and evidence on the equal pay claim there were significant and substantial variations in the work assigned and performed by the plaintiff. The agency thus was justified in its application of position classifications and salary differentials between the two. Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir 1976); cert. denied, 434 U.S. 1086 (1978). Nor was there any showing that the agency used the classification system as a means of circumventing

the provisions of the Act or that responsible supervisory personnel recognized that plaintiff's position classification was improper or flawed and did nothing to correct the situation.

The plaintiff's emphasis and focus on the fact that Bearer was unable to perform functions which she performed during his initial period at the Washington Office, was misplaced. As explained, the reason for this, was agency policy not to allow inspectors to perform certain duties and responsibilities until they had experienced appropriate training courses. After Bearer received such training he performed the relevant duty. To the extent that Clark and Bearer were performing the same duties because Bearer had pursued a training course, was a factor other than sex under the Equal Pay Act.

The plaintiff's claim for relief is denied. An appropriate Order will be entered.

Entered: MARCH 1, 1982

/s/
Barrington D. Parker
United States District Judge

ORDER OF THE DISTRICT COURT ON THE MERITS
March 1, 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1636

==========

MARLENE CLARK,

Plaintiff,

v.

DREW LEWIS,

Defendant.

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O R D E R

For the reasons set forth in the Memorandum filed in this case, it is by the Court this 1st day of March, 1982,

ORDERED that judgment be entered for defendant and dismissing this cause with prejudice.

/s/
Barrington D. Parker
United States District Judge

# APPENDIX II

## Documents Relating to Department of Justice Policy on Costs

ORDER AND MOTION IN THOMAS V. SECRETARY OF THE NAVY, June 7, 1978

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
September Term, 1977

No. 77-1965

==========

Charles Thomas, on behalf of himself and all others similarly situated,

Appellants,

v.

Secretary of the Navy, et al,

==========

BEFORE: Wright, Chief Judge and Fahy, Senior Circuit Judge

O R D E R

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Filed June 7, 1978

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On consideration of the joint motion of appellant and appellee to vacate order on appeal and dismiss, it is

ORDERED BY THE Court that the aforesaid motion is granted and this appeal is dismissed.

The Clerk is directed to transmit a certified copy of this order to the District Court as promptly as the business of his office permits.

Per Curiam

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1977

No. 77-1965

==========

CHARLES A. THOMAS,

Plaintiff- Appellant,

v.

SECRETARY OF THE NAVY,
Defendant-Appellee.

==========

JOINT MOTION TO VACATE ORDER AND DISMISS APPEAL

The plaintiff-appellant, Charles A. Thomas, and the defendant-appellee, Secretary of the Navy, hereby jointly move that the district court's August 31, 1977 order taxing costs against the plaintiff be vacated as moot and this appeal be dismissed.

1. Plaintiff, a civilian employee of the Department of the Navy, brought this suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C § 2000e-16, charging that he was the victim of race discrimination. Plaintiff was unsuccessful, and final judgment was entered in favor of the government. The government then moved that costs in the sum of $409.50 be taxed against the plaintiff. Plaintiff opposed any taxation of costs, arguing that the government was statutorily barred from recovering costs in a Title VII case. While maintaining that there was no statutory bar, and that under Rule 54(d), Fed. R. Civ. Pro., the United States, like any other litigant, is entitled to costs, the government stated that since plaintiff appeared to be heavily in debt due to the litigation, there would be no objection

"to a discretionary reduction of costs by the Court."

2. the district court, in an order entered August 31, 1977, agreed that, as a matter of law, the government was entitled to costs. However, the court, noting the government's suggestion, and observing that, even though he lost, the plaintiff had performed a public service in bringing the suit, reduced the cost award to $248.65. Plaintiff appealed solely on the cost question.

3. During the pendency of the plaintiff's appeal, the Department of Justice issued guidelines specifying the circumstances under which the government would seek costs when it prevailed as a defendant in a Title VII case.[1/] Under the criteria set forth in the guidelines,

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1/ A copy of those guidelines, issued on April 14, 1978, are attached to this motion.

this is not the type of case in which the government would seek costs.

4. The issuance of the guidelines, and the government's current position, based on the guidelines, that plaintiff should not be taxed for costs has eliminated any controversy between the parties and has rendered the appeal moot. Accordingly, the plaintiff and the government jointly agree to waive all rights which they have have against each other for costs or attorney's fee incurred in this action at the trial or appellate levels. They consequently jointly request that this Court vacate as moot the August 31, 1977, order taxing costs against the plaintiff and dismiss the appeal.

Respectfully submitted

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## [¶ 5083] GUIDES FOR SEEKING COSTS IN FEDERAL EMPLOYEE SUITS

Guidelines for government attorneys in filing motions for the assessment of court costs against federal employees bringing bias actions against federal agencies were supplied in a memorandum issued by the Assistant Attorney General on April 14, 1978. Text of the Memorandum appears below.

In *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, [15 EPD ¶8041] 46 U. S. L. W. 4105, 4107 (U. S. Jan. 23, 1978), the United States Supreme Court, in declining to allow attorneys' fees to be routinely awarded to prevailing defendants in Title VII actions, characterized the Title VII plaintiff-employee as "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority'" (quoting *Newman v. Piggie Park Enterprises*, [2 EPD ¶9834] 390 U. S. 400, 402 (1968)). Because the Title VII plaintiff-employee appears before the court "cloaked in a mantle of public interest," *United States Steel Corp. v. United States*, [9 EPD ¶10,225] 519 F. 2d 359, 364 (3d Cir. 1975), the rule that prevailing parties generally are entitled to the costs of the lawsuit should not apply automatically to actions in which the Federal Government defeats an employee's Title VII charge of discrimination. As one court has stated: "The awarding of costs to the Government when it successfuly defends itself against a Title VII claim should not become a mechanical process that will discourage potential plaintiffs from pursuing debatable claims." *Jaspers v. Bernstein*, Civil Action No. 76-1411 (D. D. C. Sept. 19, 1977); *cf. Alonso v. Union Oil of Calif.*, 71 F. R. D. 523, 524 (S. D. N. Y. 1976). The Government must be particularly wary of creating an *in terrorem* effect on potential plaintiffs with meritorious Title VII claims, in view of the fact that many of these plaintiffs can scarcely afford to bear their own costs of litigation. See *Miller v. International Paper Co.*, [1 EPD ¶9968] 408 F. 2d 283, 293 (5th Cir. 1969); cf. *Boas Box Co. v. Proper Folding Box Corp.*, 55 F. R. D. 79, 81 (E. D. N. Y. 1971) (considering economic resources of parties).

Accordingly, the Government should not move for costs as a prevailing defendant in a discrimination suit brought by a federal employee under Title VII unless any one of the following three circumstances is found to exist:

(1) the plaintiff brought the action in bad faith;

(2) the plaintiff pursued the claim in a harassing or vexatious manner;

(3) the plaintiff litigated a claim that was patently groundless or frivolous.

Application of the first factor (bad faith) is illustrated by the case of *Carrion v. Yeshiva University*, 535 F. 2d 722 (2d Cir. 1976). In allowing the imposition of costs and attorneys' fees on the plaintiff, the court found that the plaintiff's Title VII claim was substantially the same as charges she had previously brought and litigated, that she had perjured herself in pursuing her claim, and that she and another employee had deliberately attempted to ruin the reputation of their supervisor.

Application of the second factor (harassing or vexatious conduct) is illustrated by the case of *Quaker Chair Corp. v. Litton Business Systems, Inc.*, 71 F. R. D. 527, 537 (S. D. N. Y. 1976). There the court awarded costs to the (non-Title VII) plaintiff in connection with its opposition to defendant's motion to vacate a deposition. Even though the deposition was vacated, the court found it appropriate to assess costs against the defendant, where the defendant, after refusing to stipulate to facts that plaintiff sought to discover and after forcing plaintiff to incur costs in seeking to establish those facts, belatedly conceded those facts. See also *Reeves Brothers, Inc. v. U. S. Laminating Corp.*, 417 F. 2d 869, 873 (2d Cir. 1969) (awarded costs to prevailing party where opposing party "consumed needless time and effort in trying frivolous 'shotgun' claims").

In applying this second factor, the Government should avoid penalizing the client unfairly for the unreasonable conduct of his or her attorney. If the lawyer's conduct is unacceptable, the Government should in appropriate cases consider alternatives that do not impute that conduct to the client—for example, asking the court to find the lawyer in contempt or initiating disciplinary action. Where plaintiff's counsel "so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously," the attorney may be held personally liable for such costs under 28 U. S. C. § 1927. The Government should move to hold the plaintiff liable for costs under this factor only where it would not be unfair to charge the plaintiff with counsel's unreasonable conduct. Generally, if the client clearly did not know of counsel's behavior or otherwise took no part in it, the Government should not move for costs based upon this factor. Moreover, in assessing the unreasonableness of plaintiff's conduct, the Government should consider whether its own conduct was at all times reasonable.

In applying the third factor (baselessness of the claim), the Government should heed the Supreme Court's cautionary language in *Christiansburg*, 46 U. S. L. W. at 4107-08:

> [I]t is important that a district court resist the understandable temptation to engage in *post-hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

While it is difficult to establish any hard-and-fast rules for determining whether a claim is patently frivolous, a few guidelines may be offered to assist in that determination. First, a plaintiff is less likely to have a "frivolous" claim if he or she is able to establish a *prima facie* case. Second, a claim based on a novel legal theory should not be deemed "frivolous" if the theory, though novel, is at least debatable. Finally, if the plaintiff abandons a frivolous suit promptly after the discovery of the facts that demonstrate its baselessness, the Government generally should not seek costs; the abandonment of patently frivolous claims will thereby be encouraged.

As a final note, there may be cases in which the assessment of costs is appropriate but the plaintiff's financial situation warrants reduction of costs. Remember that motions for costs are intended to deter baseless or unreasonable claims and not to create an extreme hardship on the plaintiff.

Back reference.—¶ 1211.



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AFFIDAVIT re: COSTS POLICY FILED IN Lewis v. N.L.R.B., S.D. Tex. 76-H-780, April 6, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

==========

DONALD R. LEWIS, et al.,

Plaintiffs,

v.

NATIONAL LABOR RELATIONS BOARD, et al.,

Defendants.

==========

A F F I D A V I T

J. PAUL McGRATH hereby swears as follows:

1. I am Assistant Attorney General for the Civil Division of the United States Department of Justice. As such, I have responsibility over matters of litigating

policy, including the policy of the Department of Justice with regard to seeking costs as a prevailing party, as permitted by Rule 54(d), Federal Rules of Civil Procedure.

2. In February 1983 I received an inquiry from Robert Rodrigues, Asssistant United States Attorney, Southern District of Texas, as to this Department's policy with regard to moving for costs as prevailing defendant in a Title VII action. I replied that I saw no reason to differentiate between Title VII and other actions where the United States prevails and that I was not aware of any law requiring the United States to do so. I concluded that the United States would move for costs as the prevailing party in Title VII cases as it would in any other case, and I authorized the Asssistant United States Attorneys to make such a representation in court.

When later apprised of an April 14, 1978 memorandum of a former Assistant Attorney General to the contrary, I sent out a superseding memorandum on April 1, 1983 (copy attached as Exhibit 1) making clear that the Department's policy on seeking costs was uniform as I understood it to be when the issue first came to may attention.

3. Therefore the policy expressed in my April 1, 1983 memorandum was in full force and effect as of March 4, 1983 as represented in the Reply of the United States to Plainitffs' Response to Defendant's Bill of Costs filed March 4, 1983, in this action, Lewis v. NLRB, Civ. Action No. 76-H-780 (S.D. Tex.)(copy attached as Exhibit 2). The representations made in the Reply were true and accurate when

made and continue to be so.

/s/
J. PAUL MCGRATH
Assistant Attorney General

Subscribed to and sworn to before
me this 6th day of April, 1983

My commission expires May 31, 1984.

/s/ Vera H. Williams
Notary Public

Office of the Assistant Attorney General

Washington, D.C. 20530

1 APR 1983

MEMORANDUM

TO: All United States Attorneys

FROM: J. Paul McGrath
Assistant Attorney General
Civil Division

SUBJECT: Guidelines for Motions for Costs

As you are aware, the United States, like any other litigant, is entitled to recover the costs of litigation under Rule 54(d), Federal Rules of Civil Procedure. I would like to remind you that when the government is considering moving for costs as the prevailing defendant in litigation, discretion should be exercised in determining whether a request for the assessment of costs or a reduction in the amount of costs is appropriate. Although it is difficult to establish any set rules for determining under what circumstances costs should not be sought, there may be cases, for example, when the plaintiff's financial situation at the time the litigation was initiated or as a result of the litigation, warrants a request for a reduction in costs or a waiver of costs.

If you have any questions concerning this matter, contact my Special Assistant, Greg Walden, at 633-5713. This memorandum supersedes the memorandum of the Assistant Attorney General, Civil Division, dated April 14, 1978.

GOVERNMENT EXHIBIT 1

Office - Supreme Court, U.S.
FILED
DEC 14 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-385

# In the Supreme Court of the United States

OCTOBER TERM, 1983

MARLENE GRATCHNER CLARK, PETITIONER

*v.*

ELIZABETH HANSFORD DOLE, SECRETARY OF TRANSPORTATION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTION PRESENTED

Whether the district court erred in awarding costs in favor of the government.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is reported at 713 F.2d 864 (mem.).

### JURISDICTION

The judgment of the court of appeals was entered on June 7, 1983. The petition for a writ of certiorari was filed on September 6, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Petitioner, a civilian employee of the Federal Aviation Administration, brought this action under Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e-16, and the Equal Pay Act of 1963, 29 U.S.C. 206(d). Following an 11-day bench trial, the district court dismissed petitioner's claims with prejudice (Pet. App. 49a).

In a written opinion the court extensively reviewed the evidence at trial (*id.* at 13a-42a) and found, among other things, "that the testimony offered by the agency was generally far more credible than that offered by [petitioner]" (*id.* at 33a) and that petitioner's "direct[,] cross and rebuttal testimony appeared to be tangled with the truth" (*id.* at 41a). After "weigh[ing] and assess[ing] the credibility of [petitioner], her various witness[e]s and the several persons testifying for the FAA" (*id.* at 12a-13a), the court concluded that the "clear preponderance of testimony demonstrates that [petitioner] was not discriminated against because of her sex and that she does not have a valid Equal Pay Act claim" (*id.* at 13a). In particular, with respect to the Title VII claim, the court held that petitioner "has failed to establish a *prima facie* case of discrimination" and did not show "that the stated nondiscriminatory reasons for disciplinary action and non-promotion were merely pretexts for unlawful discrimination" (*id.* at 43a). Likewise, the court held that petitioner "has failed to make out a *prima facie* showing" on her Equal Pay Act claim (*id.* at 46a).

Following entry of judgment against petitioner, respondent as the prevailing party filed a bill of costs pursuant to Fed. R. Civ. P. 54(d). Petitioner objected to the amounts and types of costs requested by the government and also argued that the Department of Justice had a policy against seeking costs in Title VII actions by federal employees unless the suit had been brought in bad faith, was pursued in a harassing or vexatious manner, or was patently groundless or frivolous.

The district court awarded costs relating to transcripts and depositions, but declined to order reimbursement attributable to the fees and expenses of two government witnesses (Pet. App. 3a-6a). In making this award, the court was mindful that "Congress intended Title VII proceedings

to act as a vehicle in eliminating discrimination in employment and that charging litigation costs may discourage litigants from bringing meritorious claims" (*id.* at 4a). The court also noted that "[w]hile [petitioner's] claims in this proceeding were certainly not well supported, they were not completely frivolous" (*ibid.*). In light of these considerations, the district court, exercising its discretion under Fed. R. Civ. P. 54(d), made a partial award of costs in favor of the government. Thereafter, the court denied petitioner's motion to alter or amend the award of costs (Pet. App. 7a-9a).

Petitioner did not appeal the dismissal of her case on the merits. However, she did seek review of the issue of costs. The court of appeals rejected her contentions and affirmed the order of the district court (Pet. App. 1a-2a).

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of the other courts of appeals. Accordingly, further review is not warranted.

Petitioner does not challenge the district court's exercise of discretion under traditional standards applicable to Rule 54(d). See, *e.g., Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 351-352 (1981). Rather, she contends (Pet. 17-20) that a different rule should apply in Title VII litigation that would limit the availability of costs in favor of the defendant—and especially the federal government — as the prevailing party. As petitioner recognizes (Pet. 18 & n.5), the courts of appeals that have considered the issue are in agreement that no special rule of costs is applicable to prevailing Title VII defendants, including the government. See *Poe* v. *John Deere Co.*, 695 F.2d 1103, 1108 (8th Cir. 1982); *NOW* v. *Bank of California*, 680 F.2d 1291, 1294 (9th Cir. 1982); *Montgomery* v. *Yellow Freight System, Inc.*, 671 F.2d 412,

413 (10th Cir. 1982); *Allen* v. *United States Steel Corp.*, 665 F.2d 689, 697 (5th Cir. 1982); *Croker* v. *Boeing Co.*, 662 F.2d 975, 998-999 (3d Cir. 1981); *Danner* v. *United States Civil Service Commission*, 635 F.2d 427, 433 (5th Cir. 1981); *Johnson* v. *Nordstrom-Larpenteur Agency, Inc.*, 623 F.2d 1279, 1282 (8th Cir.), cert. denied, 449 U.S. 1042 (1980). This conclusion is fully consistent with the plain and unqualified language of Rule 54, which contains no exception for Title VII litigation. See *Croker* v. *Boeing Co.*, 662 F.2d at 998.

Contrary to petitioner's reliance (Pet. 17, 19) on *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978), the issue of costs presented in this case is far different from that of attorney's fees. As the en banc District of Columbia Circuit has recently explained:

> Unlike attorneys' fees, whose magnitude and unpredictability have discouraged parties with otherwise meritorious claims from litigation, the small and predictable costs of court fees, printing costs, and court reporters' fees have customarily been viewed as necessary and reasonable incidents of litigation, properly reimbursable to the victors.

*Baez* v. *United States Department of Justice*, 684 F.2d 999, 1003 (1982) (footnotes omitted). The above decisions of the courts of appeals have correctly recognized that Title VII does not create by implication an exemption from Rule 54(d) or immunize an unsuccessful plaintiff from the "liability for costs [that] is a normal incident of defeat" (*Delta Air Lines, Inc.* v. *August*, 450 U.S. at 352).[1]

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[1]In addition, the district court exercised its discretion in this case with full awareness of the need not to allow the award of costs to discourage the prosecution of meritorious Title VII suits. See pages 2-3, *supra*; compare *Christiansburg*, 434 U.S. at 418-419. Nor did the district court engage in the "*post-hoc* reasoning [of] concluding that, because a plaintiff did not ultimately prevail, [the] action must have been

Nor were costs impermissible here, as petitioner argues (Pet. 20-27), because the Department of Justice had a policy against "automatically" or " 'mechanical[ly]' " (Pet. App. 57a) seeking costs from unsuccessful Title VII plaintiffs.[2] The internal memorandum upon which petitioner relies represents a statement of Department policy that does not have the force of law or confer enforceable rights on third parties. See *United States* v. *Caceres*, 440 U.S. 741 (1979); *Independent Meat Packers Association* v. *Butz*, 526 F.2d 228, 229, 236 (8th Cir. 1975), cert. denied, 424 U.S. 966 (1976); *Manhattan-Bronx Postal Union* v. *Gronouski*, 350 F.2d 451, 456 (D.C. Cir. 1965), cert. denied, 382 U.S. 978 (1966). Accordingly, even if we assume for present purposes that the policy would not have supported a request for costs in this case and that petitioner had relied on the policy in pursuing her lawsuit, it did not bar the district court's award of costs or work an estoppel against the government.[3]

---

unreasonable or without foundation" (434 U.S. at 421-422). To the contrary, here petitioner's claim, while perhaps "not completely frivolous," was "certainly not well supported" (Pet. App. 4a). In these circumstances the granting of costs to the defendant would not threaten to deter legitimate — even if ultimately unsuccessful — lawsuits. See *Sun Ship, Inc.* v. *Lehman*, 655 F.2d 1311, 1316 (D.C. Cir. 1981).

[2]As petitioner acknowledges (Pet. 14-16, 22), this policy has been rescinded and is no longer in effect (see Pet. App. 59a-62a). Accordingly, this issue will not continue to arise in the future. Moreover, the consequences of the policy for past lawsuits — many of which have long been concluded — is not of sufficient importance to call for this Court's attention.

[3]The Department's policy provided that costs should not be sought unless, inter alia, the plaintiff's claim "was patently groundless or frivolous," which was illustrated to mean that the plaintiff was not "able to establish a *prima facie* case," did not raise a claim "based on a novel legal theory," or did not "abandon[] a frivolous suit promptly after the discovery of the facts that demonstrate its baselessness" (Pet. App. 58c). As discussed above, petitioner failed to make out a prima facie case on either of her causes of action, did not present a novel legal theory, and pursued her claims to a final judgment that entailed an 11-day trial on the merits.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
*Solicitor General*

DECEMBER 1983

DOJ-1983-12